

COMMERCIAL BENEFIT - ITS IMPORTANCE TO CORPORATE ACTIONS OF JERSEY COMPANIES



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Introduction This briefing note provides an overview of why the commercial benefit of a proposed corporate action should be at the forefront of every director's mind. More detailed guidance or advice is available on request.

Commercial Benefit - what is it all about?

Article 74(1) of the Companies (Jersey) Law 1991 (the **Law**) imposes fiduciary duties on directors to:

- act honestly and in good faith with a view to the best interests of the company; and
- exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

As a result of this statutory duty (and other fiduciary duties of directors) it is important directors consider carefully the terms of any proposed action and are satisfied and able to explain how such steps benefit the company in order to demonstrate they are exercising their powers in good faith and in the best interests of the company.

The test is what an intelligent and honest person in the position of a director would believe to be for the benefit of the company taking into consideration all the circumstances in relation to that action. Such circumstances are generally expected to include the directors trying to balance both the short and long term interests of the company and its current and future shareholders. Provided the directors can illustrate they have given adequate consideration to such matters, it does not necessarily matter, if some action (e.g. the entry into a particular contract) is subsequently found to be less desirable than first imagined.

There may be occasions where an action may not be considered to be in a company's best interests because there is either no or insufficient commercial benefit in such action being pursued. Examples include giving group guarantees or granting security in favour of a third party.

What happens if there is no commercial benefit?

If an action could not reasonably be considered to have any commercial benefit then, as a starting point, the directors ought not to pursue such course of action. However, articles 74(2)-(3) of the Law refines this by permitting an action which lacks commercial benefit

to be pursued, without any deemed breach of director duty if:

- all shareholders of the company authorise and ratify the action; and
- after taking the action, the company will be able to discharge its debts as they fall due. (the **Authorisation Process**)

If the Authorisation Process is not adequately taken or evidenced, the action could be challenged and potentially overturned. In addition, the directors could face proceedings for having breached their fiduciary and statutory duties.

Action Point

The above demonstrates the importance of considering the commercial benefit of a proposed action. If the directors are in any doubt about the merits of a course of action it is prudent to:

- satisfy themselves that immediately after the action is taken the company will be able to discharge its debts as they fall due; and only once this is confirmed
- seek a shareholders authorisation to enter into the transaction.

Contact:

This briefing is only intended to give a summary of the subject matter. It does not constitute legal advice. If you would like legal advice or further information, please contact us using the details below.

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